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OUTSTANDING ITEMS

CONSIDERATION OF PROCEDURES AND INSTITUTIONAL MECHANISMS FOR THE RESOLUTION OF QUESTIONS OF IMPLEMENTATION, IN ACCORDANCE WITH ARTICLE 27 OF THE CONVENTION, WITH A VIEW TO DECIDING HOW TO TAKE THIS MATTER FORWARD

Note by the secretariat

1. At its second session, the Conference of the Parties, by decision 2/COP.2, decided to include as selected items on the agenda for its third session, consideration of procedures and institutional mechanisms for the resolution of questions on implementation, in accordance with article 27 of the Convention. By its decision 22/COP.2, the Conference of the Parties decided also to consider the issue further at the third session of the Conference of the Parties in the light of the progress of the negotiations on the same issues in other relevant environmental conventions with a view to deciding how to take this matter forward.

2. The present note reproduces the content of document ICCD/COP(2)/10, part one, to facilitate discussion on these items.

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RESOLUTION OF QUESTIONS ON IMPLEMENTATION

I. INTRODUCTION

1. At its eighth session, the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification (INCD) considered the question of the procedures to resolve questions on implementation on the basis of document A/AC.241/50. This latter document was prepared by the secretariat in response to a request from the INCD by virtue of paragraph 5 of its resolution 6/1 entitled "Organization and programme of work for the interim period" (A/50/74, appendix II).

2. At the same session, the INCD by its decision 8/10 postponed further consideration of the item on "resolution of questions" to the first session of the Conference of the Parties (COP) to the Convention to Combat Desertification (CCD) (A/51/76). Subsequently, by its decision 9/COP.1, subparagraph 3(b), the COP decided to include on the agenda for its second and, if necessary, its third session the item on procedures and institutional mechanisms for the resolution of questions that may arise with regard to implementation (ICCD/COP(1)/11/Add.1).

3. The present note updates document A/AC.241/50. More particularly, it provides current information with regard to the relevant precedents cited in that document as well as information on new developments. The preliminary list of possible queries outlined in section III of document A/AC.241/50 is maintained. The background information together with the list of preliminary questions are intended to assist the COP in its deliberations to formulate procedures and mechanisms required for the purposes of article 27 of the CCD without attempting to design a "resolution of questions" regime.

II. BACKGROUND

4. Article 27 of the Convention provides that:

> "The Conference of the Parties shall consider and adopt procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention."

5. Provisions of that type are generally considered to be a relatively new feature of environmental conventions. They are an attempt to pre-empt and avoid confrontation that might trigger more formal dispute resolution procedures. They are thought to be particularly well suited to global environmental regimes, where many Parties share an interest in the effective implementation of the Convention's objectives.

6. The pre-emptive and non-confrontational approach is becoming the practice in certain new environmental treaties, especially when non-implementation stems from lack of capacity or inadvertence. Because procedures for resolution of questions

remain within the jurisdiction of a convention's governing body, they are generally considered as a means of enabling Parties to a convention to discuss its implementation in a constructive and cooperative manner to secure amicable solutions.

III. RELEVANT PRECEDENTS

7. The most relevant precedents relating to article 27 of the CCD include the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol); the 1994 Protocol on Further Reductions of Sulphur Emissions (the Second Sulphur Protocol) to the 1979 United Nations Economic Commission for Europe (UN/ECE) Convention on Long-Range Transboundary Air Pollution (LRTAP), as well as article 13 of the United Nations Framework Convention on Climate Change (FCCC).

8. While the few existing precedents provide some legal bases for giving effect to article 27 of the CCD, they must be examined with caution. The balance of obligations varies from one treaty to another. Hence, the procedures and institutional mechanisms need to be tailored to suit individual treaties. The following review of relevant precedents should therefore be examined with this in mind.

9. The full non-compliance procedure of the Montreal Protocol was created by decision IV/5 at the fourth meeting of the Parties to that Protocol (UNEP/OzL.Pro.4/15). It is in the process of being reviewed by the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance[1] established in September 1997 by decision IX/35 of the Parties to the Protocol (UNEP/OzL.Pro.9/12). By the date of the CCD Conference of the Parties in Dakar, the Ad Hoc Working Group will have presented its final report to the tenth meeting of the Parties and the actions taken in light of the options outlined in footnote 1 below will be clear.

10. Decision 1997/2 of the Executive Body of the LRTAP Convention urges the Parties to the Second Sulphur Protocol to apply the new compliance regime set out in its annex[2]. In fact, decision 1997/2 has the effect of applying the new compliance regime to all LRTAP protocols but for illustrative purposes only the Second Sulphur Protocol is mentioned in the present note.

1/ The Ad Hoc Group met in July 1998 and decided to prepare a draft decision for consideration by the Parties to the Montreal Protocol. Three options were presented for the Group's conclusion: (a) a list of amendments to the text of non-compliance procedures; (b) concerns reflected in a decision in the form of a commentary, guidance or interpretive statements; (c) a combination of the first two options (see document UNEP/OzL.Pro/WG.1/17/3).

2/ ECE/EB.AIR/53.

11. With regard to the United Nations Framework Convention on Climate Change (FCCC), its article 13 provides that the COP of the FCCC shall, at its first session, consider "the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention."

12. Accordingly, the COP 1 of the FCCC established an open-ended ad hoc working group of technical and legal experts "to study all issues relating to the establishment of a multilateral consultative process and its design" (FCCC/CP/1995/7/Add.1, decision 20/CP.1). The report of the latest meeting of the Ad Hoc Group on Article 13 (June 1998) indicates that there is agreement on key areas such as on the objective, the nature and outcome of the multilateral consultative process (MCP) as well as on the creation of a standing Multilateral Consultative Committee reporting to the COP of the FCCC (FCCC/AG13/1998/2).

13. As in the case of the Montreal Protocol, the COP 4 of the FCCC will, by the time of the CCD Conference of the Parties in Dakar, have considered the final report of the Ad Hoc Group on Article 13 and decided on whether to adopt, modify or reject it.

14. It is to be noted from the outset that the Parties to the Montreal Protocol, the Second Sulphur Protocol and the FCCC have all decided that their respective "resolution of questions" regimes shall apply without prejudice to the provisions of dispute settlement procedures already existing in the individual treaties.

15. The following sections A and B provide updated information on (a) the procedural aspects and (b) the related institutional aspects of the regimes concerned.

A. Procedural aspects of precedents

16. Procedural aspects of mechanisms for the resolution of questions envisaged under article 27 of the CCD could address such substantive issues as: the principles governing implementation, i.e. the objectives and nature of the mechanism; powers assigned to the institutional mechanism; who can invoke the procedure; and the outcome of the procedure.

Objectives

17. The aim of the procedure contained in the Montreal Protocol is to secure "an amicable solution of the matter on the basis of respect for the provisions of the protocol". The system of the Second Sulphur Protocol foresees cooperative measures such as assisting Parties to comply with the Protocol. The objective of the MCP under the FCCC is to resolve questions regarding implementation of the FCCC by providing advice on assistance to Parties to overcome difficulties encountered in their implementation, promote understanding of the FCCC and prevent disputes from arising.

Nature

18. The main principles of the non-compliance regime of the Montreal Protocol are avoidance of complexity, avoidance of confrontation, transparency and the leaving of decision-making to the Meeting of the Parties. Similar principles are to be found in the Second Sulphur Protocol and the FCCC regimes. The latter regime specifies that its MCP is facilitative, cooperative, non-confrontational, transparent, timely and non-judicial.

Mandate/function

19. The Montreal Protocol Implementation Committee (MPIC) handles questions regarding non-compliance with the aim of securing an amicable solution. Likewise, the functions of the Second Sulphur Protocol Implementation Committee include: reviewing periodically compliance by Parties with the reporting requirements of the protocols and considering any submission or referrals made to it with a view to securing a constructive solution.

20. As for the standing Multilateral Consultative Committee of the FCCC, its mandate is to consider questions of implementation by: (a) clarifying and resolving questions; (b) providing advice on the procurement of technical and financial resources for the resolution of these difficulties; and (c) providing advice on the compilation and communication of information.

Invoking of procedures

21. The Montreal Protocol and the Second Sulphur Protocol have almost identical provisions relating to the invoking of procedures. Under the former regime the following could invoke the procedures: one or more Parties regarding another Party's implementation; a Party with regard to its own inability to comply fully in spite of its best bona fide efforts; and the secretariat with regard to preparation of reports under the Protocol and on any other information concerning compliance with the Protocol's provisions.

22. However, the role of the secretariat of the Second Sulphur Protocol is greater than that of the Montreal Protocol; it is not limited to the provision of information and is allowed to report on possible non-compliance. If upon reviewing the reports submitted by Parties, it becomes aware of possible non-compliance by any Party, it can request further information on the matter and it can report to the Implementation Committee in the case of failure to resolve the matter through administrative action and diplomatic contacts.

23. With regard to the MCP of the FCCC, that process is envisaged to be triggered by: (a) a Party with respect to its own implementation; (b) a group of Parties with respect to their own implementation; (c) a Party or group of Parties; and/or (d) the COP of the FCCC.

Other powers

24. Where it considers it necessary, the MPIC has the power to request through the secretariat more information on matters under its consideration. It also has the power to undertake information-gathering inside the territory of a Party concerned but only "upon invitation of the Party concerned". The Implementation Committee of the Second Sulphur Protocol possesses similar powers.

25. COP 1 of the FCCC provided, *inter alia*, the mandate for undertaking an in-depth review of individual reports of Annex I Parties[3]. That COP also agreed to the possibility of on-site visits to Annex I country Parties, almost all of which extended invitations to this effect[4].

26. Experience has shown that the in-depth reviews, including country visits, have been conducted in a facilitative and non-confrontational manner[5]. Both are carried out by experts drawn from developed countries, economies in transition and developing countries. Secretariats of several intergovernmental organizations have also provided experts. How the in-depth reviews would relate to article 13 of the FCCC remains to be seen.

Outcome

27. The MPIC forwards a report to the Meeting of the Parties of the Montreal Protocol, including any recommendations it considers appropriate. The Implementation Committee of the Second Sulphur Protocol also reports to the LRTAP Parties on its activities at the annual sessions and makes such recommendations as it considers appropriate regarding compliance with the Protocol. Again, the outcome of the MCP of the FCCC is envisaged to be a report that the standing Committee submits to the COP along with concerned Parties' comments on the conclusions and recommendations of the report.

B. Related institutional aspects of precedents

28. Issues relating to the institutional aspects of the "resolution of questions" mechanisms include the matter of composition of such a mechanism and the regularity of meetings.

3/ FCCC/CP/1995/7/Add.1, decision 2/CP.1, paragraph 2.

4/ See Jo Elizabeth Butler, "The establishment of a dispute resolution/non-compliance mechanism in the Climate Change Convention", The American Society of International Law, Proceedings of the 91st Annual Meeting, Washington, D.C. (9-12 April 1997).

5/ Ibid.

Composition

29. The Implementation Committee of the Montreal Protocol consists of ten members while that of the Second Sulphur Protocol is composed of eight members. Apart from this aspect the two regimes concerned are comparable in matters related to composition. Members of the implementation committees of both the Montreal Protocol and the Second Sulphur Protocol are elected by the Parties of the respective regimes on the basis of equitable geographical distribution.

30. Elected members under the two regimes concerned serve a term of two years and may be re-elected but only for one consecutive term. To ensure a certain level of experience among the members serving on the Committees, only half are replaced every year. Furthermore, the committees concerned elect their own president and vice-president both of whom serve a one-year term. In the FCCC context the question of the composition of the standing committee proposed to be created under article 13 remains unresolved.

Regularity of meetings

31. MPIC meets at least biannually, unless it decides otherwise, and its meetings are organized by the secretariat. The Implementation Committee of the LRTAP meets twice a year, unless it decides otherwise. However, the standing committee proposed to be established for the purpose of article 13 of the FCCC is envisaged to meet at least once a year and whenever practicable in conjunction with sessions of the COP or its subsidiary bodies.

IV. NEW DEVELOPMENTS

32. Several other possible related precedents in the area of resolution of questions are also evolving. First among these is the Kyoto Protocol to the FCCC. This Protocol was adopted by the COP of the FCCC on 11 December 1997. Article 18 of the Kyoto Protocol requires the COP of the FCCC, serving as the meeting of the Parties to the Protocol to approve, at its first session, appropriate and effective procedures and mechanisms to determine and address cases of non-compliance with the Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance.

33. At the same time article 16 of the Kyoto Protocol enables the COP of the FCCC serving as the meeting of the Parties to the Protocol to consider and to modify, as appropriate, the application of the MCP referred to in article 13 of the FCCC. Any MCP that may be applied to the Kyoto Protocol is to operate without prejudice to the procedures and mechanisms established under article 18 of that Protocol.

34. How the procedures and mechanisms to be developed under the Kyoto Protocol will relate to what is created under article 13 of the FCCC remains to be seen. Any modification in the application of the MCP referred to in article 13 for the purposes of the Kyoto Protocol may have an impact on other processes based on that

article. Moreover, the provisions of the CCD may possibly overlap with the provisions of the Kyoto Protocol, given the scope and the breadth of the former.

35. Article 3 of the CCD suggests an approach to implementation that is integrated and based on partnership and participation. If the COP decides that the mechanisms and procedures of article 27 should reflect such an approach then the participatory notions of article 15 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Convention on Public Participation) might be of relevance.

36. The Convention on Public Participation was adopted by the Environment for Europe Conference held on 23-25 June 1998. It should be borne in mind in considering the possible relevance of this Convention that it relates to a restricted geographic area and has yet to enter into force. Article 15 of that Convention provides for reviewing compliance by requiring the Meeting of the Parties to establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance. The arrangements are to allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to that Convention.

37. Another example lies in article 17 of the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. This latter convention was adopted and opened for signature in Rotterdam on 10-11 September 1998. The Convention on Prior Informed Consent also envisages the development of a non-compliance regime. Its article 17 requires the governing body of the Convention concerned to, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the Convention and for treatment of Parties found to be in non-compliance.

V. RELEVANT CONSIDERATIONS

38. In light of the above review, the COP of the CCD either through a working group or some other mechanism of its choice, may wish to address certain preliminary questions which might include the following:

(a) What is the relationship between the procedures and institutional mechanisms pursuant to article 27 and the review of implementation by the COP pursuant to article 22, as well as the related provisions on communication of information pursuant to article 26?

(b) What is the relationship between the procedures and institutional mechanisms of article 27 and the dispute settlement procedures provided for under article 28? Are they mutually exclusive, i.e. should recourse to the procedures under one article prevent any recourse under the other?

(c) What are the types or range of questions that could be raised under the procedures and institutional mechanisms pursuant to article 27?

(d) What principles should govern the procedures and institutional mechanisms of article 27? Is it sufficient that they should be simple, transparent, facilitative and non-confrontational in character?

(e) What should the exact nature and composition be of the institutional mechanisms contemplated under article 27? Should membership and participation in them be restricted to representatives of Parties or should there be a role for experts such as legal, economic, social or technical experts appointed on a personal basis?

(f) Who can invoke article 27? In other words, could article 27 be triggered by entities other than Parties, for example intergovernmental organizations? non-governmental organizations? the secretariat? the subsidiary bodies of the CCD?

(g) Should the procedures and mechanisms be public and open-ended or private? What should be the degree of transparency and flexibility?

(h) At what point in time and under what conditions can a Party trigger the application of the procedures and institutional mechanisms pursuant to article 27?

(i) What would be the time-frame of application of such procedures and mechanisms from the time they are triggered to the time conclusions are reached?

(j) What would be the modalities by which such procedures and mechanisms arrive at their conclusions? What would be the nature of their various phases?

(k) What would be the legal effect, if any, of the conclusions of such procedures and mechanisms?

(l) What measures should be taken for the adoption of the procedures and institutional mechanisms?

VI. TIMETABLE FOR ACTION

39. Bearing in mind decision 9/COP.1, subparagraph 3(b), referred to in paragraph 2 above, the COP might want to consider how best to incorporate the consideration of the "resolution of questions" agenda item in its future work programme. Possible approaches for addressing the preliminary queries outlined in section IV could include the following options:

(a) Inviting COP members to communicate their views in writing to the secretariat by an agreed date and requesting the secretariat to compile these views for future COP sessions;

(b) Establishing an ad hoc committee of legal experts to review this matter and report to the COP at an agreed date;

(c) Pursuing a combination of (a) and (b).